

NISKANEN

C E N T E R

June 11, 2021

Sent via email

The Honorable Jocelyn G. Boyd
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29210
contact@psc.sc.gov

Re: Notice and Request for Comments Regarding Proposed New Pipeline Regulation

Dear Ms. Boyd:

The Niskanen Center (“Niskanen”) is a Washington, DC-based think-tank and advocacy organization with a strong interest in securing Americans’ rights to their property. Niskanen represents landowners affected by pipelines across the country in court cases¹ and in administrative agency proceedings. Niskanen applauds the Public Service Commission of South Carolina’s (the “Commission”) efforts to formally review its regulations, especially with regards to regulations—or the lack thereof—that adversely impact landowners. The Commission’s commitment to transparency is of the utmost importance to ensure that all stakeholders, especially South Carolina landowners, have meaningful access to, and participation in, the Commission’s pipeline review process.

To that end, Niskanen writes to reiterate its full support of the Southern Environmental Law Center, Upstate Forever, and Friends of Beaverdam Creek’s proposal, which will help foster basic fairness to landowners in South Carolina’s pipeline development and approval process. It is high time for fundamental notice and transparency measures to be adopted in South Carolina to ensure at the *very* least, landowners affected by pipelines understand 1. who is seeking to take their land, 2. what exactly they are seeking to take their land for, and 3. what rights they have in the relevant

¹ See, e.g. *Evans v. Fed. Energy Reg. Commn.*, No. 20-1161 (DC Cir. 2020)(challenging FERC’s authorization of Pacific Connector Pipeline); *Evans v. FERC*, No. 1:19-CV-00766, 2020 WL 2764608, at *1 (D. Or. May 27, 2020) (ruling in favor of releasing previously withheld documents to Niskanen Center’s landowner clients under FOIA); *Atlantic Coast Pipeline v. Fed. Energy Reg. Commn.*, No. 18-1224 (D.C. Cir. 2019) (Niskanen representing landowners did not have adequate notice in FERC proceeding); *Niskanen Ctr. v. Fed. Energy Reg. Commn.*, 436 F. Supp. 3d 206 (D.D.C. 2020), appeal docketed, No. 1:19-CV-00125 (D.D.C. Jan. 18, 2019) (Niskanen challenging FOIA exemptions claimed by FERC in its release of redacted landowner lists created by the Atlantic Coast Pipeline).

process. The proposed regulations will do all of the above, as well as greatly assist in correcting the significant wrongs committed against landowners by intrastate gas pipelines in South Carolina.

For the Commission's convenience, attached to this letter is Niskanen's previously filed April 6, 2021 comment letter, which provides reasonable regulations enacted in two other states that address many landowner concerns.² If other states can figure out how to ensure that landowners are informed and engaged in an intrastate pipeline development process, there is absolutely no reason why South Carolina cannot—and should not—do the same.

The Commission should seize the opportunity to adopt commonsense regulatory provisions to address harms that as one landowner put it quite simply, “should not be happening in America.” Thank you for your consideration, and please do not hesitate to reach out to us if we can be of assistance in any way.

With best regards,

/s/ Megan C. Gibson

Megan C. Gibson
Senior Staff Attorney
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Washington, DC 20002
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² See attached Exhibit A, Niskanen's April 6, 2021 comment letter. The discussion of regulations in the other states begins on page 2. There are of course other examples, but for the purposes of the comment, the two listed states adequately support the point—that other states in the country have implemented common sense regulations to ensure landowners are meaningfully informed and engaged, and there is no reason South Carolina should not do the same.

EXHIBIT A

NISKANEN

C E N T E R

April 6, 2021

Sent via email

The Honorable Jocelyn G. Boyd
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29210
contact@psc.sc.gov

Re: Workshop on April 16, 2021 Concerning Electric Systems and Gas Systems

Dear Ms. Boyd:

I intend to participate in the April 16, 2021 workshop concerning electric systems and gas systems. However, I am scheduled to speak at a Federal Energy Regulatory Commission panel that same day beginning at 1:55 pm, so if it all possible, if you could please schedule me for a morning slot, it would be much appreciated.

The Niskanen Center (“Niskanen”) is a Washington, DC-based think-tank and advocacy organization with a strong interest in securing Americans’ rights to their property. Niskanen represents landowners affected by pipelines across the country in court cases¹ and in administrative agency proceedings. Niskanen applauds the Public Service Commission of South Carolina’s (the “Commission”) efforts to formally review its regulations, especially with regards to regulations—or the lack thereof—that adversely impact landowners. The Commission’s commitment to transparency is of the utmost importance to ensure that all stakeholders, especially South Carolina landowners, have meaningful access to, and participation in, the Commission’s pipeline review process.

¹ See, e.g. *Evans v. Fed. Energy Reg. Commn.*, No. 20-1161 (DC Cir. 2020)(challenging FERC’s authorization of Pacific Connector Pipeline); *Evans v. FERC*, No. 1:19-CV-00766, 2020 WL 2764608, at *1 (D. Or. May 27, 2020) (ruling in favor of releasing previously withheld documents to Niskanen Center’s landowner clients under FOIA); *Atlantic Coast Pipeline v. Fed. Energy Reg. Commn.*, No. 18-1224 (D.C. Cir. 2019) (Niskanen representing landowners did not have adequate notice in FERC proceeding); *Niskanen Ctr. v. Fed. Energy Reg. Commn.*, 436 F. Supp. 3d 206 (D.D.C. 2020), appeal docketed, No. 1:19-CV-00125 (D.D.C. Jan. 18, 2019) (Niskanen challenging FOIA exemptions claimed by FERC in its release of redacted landowner lists created by the Atlantic Coast Pipeline).

To that end, Niskanen fully supports the Southern Environmental Law Center, Upstate Forever, and Friends of Beaverdam Creek’s proposal, which will help foster basic fairness to landowners in South Carolina’s pipeline development and approval process. *See* attached Exhibit 1, the South Carolina groups’ pipeline regulations proposal. It is high time for fundamental notice and transparency measures to be adopted in South Carolina to ensure at the *very* least, landowners affected by pipelines understand 1. who is seeking to take their land, 2. what exactly they are seeking to take their land for, and 3. what rights they have in the relevant process. The proposed regulations will do all of the above, as well as greatly assist in correcting the significant wrongs committed against landowners by intrastate gas pipelines in South Carolina.

By way of example, Niskanen provides below reasonable regulations enacted in two other states that address many landowner concerns.² If other states can figure out how to ensure that landowners are informed and engaged in an intrastate pipeline development process, there is absolutely no reason why South Carolina cannot—and should not—do the same.

IOWA

Iowa Code Chapter 479 (“Pipelines and Underground Gas Storage”) gives the Iowa Utilities Board (“IUB”) authority over the siting, construction, and operation of intrastate natural gas pipelines, and the IUB “may grant a permit in whole or in part upon terms, conditions, and restrictions as to safety requirements and as to location and route as determined by it to be just and proper.” Iowa Code § 479.12.

Iowa has noteworthy landowner protections, e.g., pipeline companies are required to give public notice even before they can apply for a permit, including holding public meetings, presided over by the IUB, in each county where “real property or property rights will be affected”, and at which the IUB must “include a summary of the legal rights of the affected landowners, and shall distribute and review the statement of individual rights required under [the Iowa Eminent Domain code].” Id. § 479.5(3)(a).

Moreover, a pipeline company is required to provide 30 days’ notice, by certified mail, to every landowner of the public meeting, the details of the project, and the landowners’ rights under Iowa law. And, similar to the regulation proposal’s Section B. (*see* attached Ex. 1), “A pipeline company seeking rights under this chapter shall not negotiate or purchase any easements or other interests in land in any county known to be affected by the proposed project prior to the informational meeting.” Id. § 479.5(5).

Worth noting is that Iowa also has a presumptive limit on the size of a pipeline easement that can be taken under eminent domain (although the IUB can expand on this if necessary):

A pipeline company granted a pipeline permit under this chapter shall be vested with the right of eminent domain to the extent necessary and as prescribed and approved by the board, not exceeding seventy-five feet in width for right-of-way and not exceeding one acre on any one location in addition to right-of-way for the location of pumps, pressure

² There are of course other examples, but for the purposes of this letter and comment, the two listed states adequately support the point—that other states in the country have implemented common sense regulations to ensure landowners are meaningfully informed and engaged, and there is no reason South Carolina should not do the same.

apparatus, or other stations or equipment necessary to the proper operation of its pipeline. *Id.* § 479.24.

OHIO

Ohio has a sophisticated procedure for the review and approval of proposed intrastate gas pipeline projects. The Ohio Power Siting Board (OPSB) certifies intrastate gas pipelines that are greater than 500 feet in length and 9 inches in diameter and designed with a Maximum Allowable Operating Pressure of greater than 125 psi.³ OAC Ann. 4906-1-01(Y).

The pipeline company is required to hold a public, pre-application informational meeting no more than 90 days prior submitting a certificate application to OPSB. OAC Ann. 4906-3-03(B)(1). The applicant is required to publish notice of the meeting between 7-21 days before the date of the meeting in newspapers of general circulation in the project area. *Id.* The applicant is also required to send out a letter to each affected property owner and tenant at least 21 days before the meeting. *Id.* The letter must include information on how the landowners can participate in the certificate proceeding, a description of the project, and detailed contact information for the pipeline company.

At the public information meeting, the applicant must present maps of the project that allow affected landowners to “identify the location of their property in relation to the [project].” OAC Ann. 4906-3-03(B)(4). The applicant must solicit written comments from the attendees and “summarize in its certificate application how many and what type of comments received.” *Id.*

On submission of the application, the applicant must give public notice within 15 days to persons residing in affected areas by publication. ORC Ann. 4906.06(C). OPSB has 60 days to conduct an application compliance review to ensure that all of the necessary components are included. ORC Ann. 4906.06; OAC Ann. 4906-2-02.

If the OPSB finds the application to be complete, OPSB will notify the applicant that it needs to give notice to affected parties. OAC Ann. 4906-3-06(A). OPSB schedules a public hearing 60-90 days out from the acceptance. *Id.*; ORC Ann. 4906.07.

The applicant must issue 2 notices of the proposed project after the application is accepted by OPSB. The first is written notice that must go to “each owner of a property crossed and/or adjacent to the preferred and alternative routes.” OAC Ann. 4906-3-09. This notice must include: a description of the project; a map of the project; list of government officials served with copies of the application; list of libraries and other locations (including electronic) where the complete application is available for public inspection; a statement that application is pending with the docket number; a statement giving the 8 criteria used by OPSB to review an application; the time and place of the public and adjudicatory hearings; and the deadline to file for intervention. OAC Ann. 4906-3-09(A).

The second notice is published in newspapers in affected areas 7-21 days before the public hearing, and must include: a description of the project; a map of the project; a statement that the application

³ However, the OPSB does not have jurisdiction over production lines, gathering lines or liquid lines. Production lines are under the jurisdiction of the Ohio Department of Natural Resources (ODNR). Gathering lines and liquid lines fall under local zoning jurisdiction, and of course interstate lines fall under FERC’s jurisdiction. <https://www.opsb.ohio.gov/information/natural-gas-pipeline-faq/> (Last visited February 7, 2019).

is pending before the board with the docket number; the time and location of the public hearing; a statement that the public will be given an opportunity to comment on the project; and a reference to the date of the first public notice. OAC Ann. 4906-3-09(A)(2).

People may intervene in the application proceedings within 30 days of the applicant's notice, and OPSB may grant a petition for intervention submitted out of time "for good cause shown." ORC Ann. 4906.08; OAC Ann. 4906-2-12.

The OPSB has sophisticated discovery mechanisms built into its application review procedure. Between the dates of the 'official filing' and the public hearing, OPSB conducts an investigation, which results in a mandatory report that becomes part of the record. ORC Ann. 4906.07. Discovery is permitted among the parties during this time, which can involve written discovery, depositions, field and site visits, and member agency analysis. *Id.* There also is a mechanism to take an immediate interlocutory appeal to certain board rulings, for example, if the board denies a motion to intervene or terminates a party's right to participate in a proceeding. OAC Ann. 4906-2-29.

The OPSB may only grant a certificate to construct a pipeline if it does a thorough analysis of the project, including, but not limited to: the basis of the need for the pipeline; the nature of the probable environmental impact; the pipeline represents minimum adverse environmental impact and considering alternatives; that the pipeline will serve the public interest, convenience, and necessity; and the impact of the pipeline on agriculture.

After the hearing, the OPSB decision is rendered. If the certificate is granted, "[a]ny party or any affected person, firm, or corporation may file an application for rehearing, within thirty days after the issuance of a board order." OAC Ann. 4906-2-32. Affected persons can also appeal a decision to the Ohio Supreme Court within 60 days of the final order. *See* OAC Ann. 4906-2-33; ORC Ann. 4903.13.

Conclusion

The Commission should seize the opportunity to adopt commonsense regulatory provisions to address harms that as one landowner put it quite simply, "should not be happening in America." Thank you for your consideration of Niskanen's comments, and please do not hesitate to reach out to us.

With best regards,

/s/ Megan C. Gibson

Megan C. Gibson
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Exhibit 1:

Regulations Proposed by the
Southern Environmental Law
Center, Upstate Forever, and
Friends of Beaverdam Creek

Subarticle 9

New Pipelines

103-495. Construction and/or Extensions of Pipelines.

A. If a gas utility intends to construct and/or extend a pipeline into an area where it does not currently have a pipeline or if a gas utility intends to construct and/or extend another pipeline in an area where it currently has a pipeline, the utility shall:

1. Prepare a map of the preferred route and any alternative routes for the proposed pipeline;
2. Prepare a list of the names and addresses of each of the property owners through whose property the preferred route and any alternative routes would be constructed;
3. Prepare an estimate of the cost of the construction of the proposed pipeline through the route or routes, with as much detail as possible at the time;
4. Determine and describe whether the area where the proposed pipeline would be built is served or can be served by electricity and whether electricity is providing or can provide the service that would be provided by the proposed pipeline;
5. Conduct and prepare a study of the direct and indirect environmental impacts of the proposed pipeline, including, but not limited to, the direct impacts of the construction of the pipeline; indirect impacts that would result from the pipeline, including, but not limited to, such factors as induced sprawl and development, air pollution, greenhouse gas emissions, and methane leaks; impacts on properties owned by private and public natural resource or conservation entities and on properties protected by conservation easements; and impacts on wildlife and wildlife habitat, including, but not limited to, federally-listed endangered and threatened species and highest priority and high priority species identified in the latest Wildlife Action Plan, or otherwise, of the South Carolina Department of Natural Resources;
6. Conduct and prepare an environmental justice study of the proposed pipeline, including, but not limited to, the direct and indirect impacts on individuals and communities of color and ethnic minorities, low income residents, heirs properties, farmlands, Century Farms, cemeteries, schools, places of worship and religious facilities, historic sites, day care facilities, and elderly residents and property owners;
7. Prepare an estimate of the amount the utility would propose to recover from ratepayers as a result of the construction and operation of the pipeline.

These materials shall be filed by the gas utility with the Commission and be available to the public at least sixty (60) days before the hearing set out in Subsection E.

B. Prior to the Commission's determination set out in Subsection F, the gas utility shall not communicate with any property owner concerning property acquisition or easements for the pipeline, other than sending the materials set out in Subsection C.

C. The gas utility shall no later than sixty (60) days before the hearing described in Subsection E send each property owner identified in Subsection A. 2. and adjacent property owners the following materials by certified U.S. mail, return receipt requested:

1. A notice of the hearing set out in Subsection E, providing the date, time, and location of the hearing; informing the recipients of their right to attend, to make oral and submit written comments before, at, and after the hearing; and providing a postal and email address of the Commission for the submission of written comments;
2. The Summary of the Rights of Property Owners Under the Eminent Domain Laws of South Carolina, set out in Subsection I;
3. Each of the items listed in Section A.

No other materials shall be included in this transmission to property owners and adjacent property owners.

D. At least thirty (30) days prior to the hearing set out in Subsection E, the gas utility shall publish a notice of the hearing set out in Subsection E in a newspaper of general circulation in the area where the proposed pipeline is proposed to be built, describing the proposed pipeline that is the subject of the hearing, providing the information set out in Subsection C.1., and providing a link to the Commission's website where the materials filed with the Commission may be accessed.

E. After the gas utility files with the Commission the materials set out in Subsection A, the Commission shall hold a hearing in or near the area where the proposed pipeline would be built. The hearing shall be held no sooner than sixty (60) days and no more than ninety (90) days after the utility sends the notice set out in Subsection C.1. Every person attending the hearing shall be provided the materials set out in Section A and the Summary of the Rights of Property Owners Under the Eminent Domain Laws of South Carolina set out in Subsection I. The gas utility shall have the opportunity to make a presentation concerning the proposed pipeline. Persons attending and the Office of Regulatory Staff may submit written or oral comments to the Commission at, before, or after the hearing and may ask questions of the utility representative or representatives attending the hearing. Written and oral comments and presentations made at the hearing shall be made part of the record concerning the proposed pipeline. Any person, organization, or entity may submit written comments to the Commission before or after the hearing during the comment period, and those comments shall also be made part of the record.

The comment period shall begin when the gas utility files with the Commission the materials set out in Subsection A and shall end on a date set by the Commission no sooner than thirty (30) days after the hearing.

F. Following the end of the comment period, the Commission shall consider all comments and materials submitted by the gas utility, the Office of Regulatory Staff, and all others at the hearing and otherwise and shall make the following decisions:

1. Whether electricity is providing or can provide the same services as the proposed pipeline;
and

2. Whether, after considering the following factors, the construction of the pipeline is in the public interest:
- (a) The map of the route for the proposed pipeline;
 - (b) The properties through which the proposed pipeline would be constructed and adjacent properties;
 - (c) The estimated cost of the construction of the proposed pipeline;
 - (d) The direct and indirect environmental impacts of the proposed pipeline, including, but not limited to, the direct impacts of the construction of the pipeline; indirect impacts that would result from the pipeline, including, but not limited to, such factors as induced sprawl and development, air pollution, greenhouse gas emissions, and methane leaks; impacts on properties owned by private and public natural resource or conservation entities and on properties protected by conservation easements; and impacts on wildlife and wildlife habitat, including, but not limited to, federally-listed endangered and threatened species and highest priority and high priority species identified in the latest Wildlife Action Plan, or otherwise, of the South Carolina Department of Natural Resources;
 - (e) The environmental justice impacts of the proposed pipeline, including, but not limited to, the direct and indirect impacts on individuals and communities of color and ethnic minorities, low income residents, heirs properties, farmlands, Century Farms, cemeteries, schools, places of worship and religious facilities, historic sites, day care facilities, and elderly residents and property owners;
 - (f) The estimated amounts the utility would propose to recover from ratepayers as a result of the construction and operation of the pipeline.

If the Commission determines both (1) that electricity is not providing and cannot provide the same services as the proposed pipeline and (2) that the construction of the pipeline is in the public interest, then the gas utility may contact property owners through whose property the pipeline would be built concerning property acquisition or easements for the pipeline. All offers by the gas utility to purchase a landowner's property or an easement for the pipeline shall be set out in writing.

G. Whenever the gas utility contacts a property owner in person, electronically, or through written materials with respect to the pipeline, the gas utility shall provide the property owner the Summary of the Rights of Property Owners Under the Eminent Domain Laws of South Carolina set out in Subsection I.

H. The determination of the Commission is without prejudice to and does not reduce or alter in any way the rights of property owners and does not in any way alter or amend any of the laws of South Carolina dealing with eminent domain.

I. The following Summary shall be posted on the Commission's website for any proposed pipeline covered by this Subarticle and distributed as set out in this Subarticle:

SUMMARY OF THE RIGHTS OF PROPERTY OWNERS UNDER THE EMINENT DOMAIN LAWS OF SOUTH CAROLINA

[This Summary is not a complete explanation of all aspects of South Carolina eminent domain law. Property owners may consult counsel of their choice for advice concerning their rights]

All property owners have the right to retain legal counsel to advise them concerning their property rights and any other matter. All property owners have the right to retain legal counsel before talking with a gas utility, its land agent, or any of its representatives concerning the owner's property.

All property owners have the right to decide whether or not to talk with a gas utility, its land agent, or any of its representatives concerning the owner's property. All property owners have the right to communicate with a gas utility, its land agent, or any of its representatives only through the property owner's legal counsel.

All property owners have the right to decide whether to refuse or agree to a gas utility's request to enter the owner's property to conduct a survey. If the property owner refuses, the gas utility is required to obtain a court order to allow it to conduct a survey on the owner's property.

All property owners have a right to reject or accept any offer by the gas utility to purchase any of the owner's property or an easement across the owner's property.

All property owners have the right to negotiate with a gas utility concerning any offer to purchase any of the owner's property or an easement across the owner's property.

The decisions by other property owners along the route of a proposed pipeline do not affect or determine the rights of other property owners. Each property owner has the right to make an independent decision about whether or not to reach an agreement with the gas utility.

All property owners have the right to negotiate specific terms of the easement, such as when and how the gas utility may access the property, security issues with regard to fencing and gates, the specific commodities that will be allowed to flow through the pipeline on the owner's property, responsibility for damage to the owner's property, compensation for agricultural or business losses caused by the pipeline and easement, the number of pipelines allowed within the easement now and in the future, and the gas utility's responsibility if the pipeline is abandoned at any point after land disturbance has started.

If the property owner decides not to sell the gas utility property or an easement across the owner's property, the gas utility can acquire the property or an easement only by filing an eminent domain lawsuit against the property owner and obtaining in that action a court order that grants the gas utility the right to exercise eminent domain and that awards the property owner just compensation for the owner's property or easement across the owner's property.

All property owners have the right to refuse offers by the gas utility and to defend against any eminent domain action that the gas utility may file in court. All property owners have the right to retain legal counsel to defend and oppose any eminent domain action.

Within thirty (30) days after service of the gas utility's Condemnation Notice, the landowner may file an action in South Carolina circuit court challenging the gas utility's right to condemn.

If anyone believes that a gas utility, its land agent, representative, or other agent has acted improperly, that person can learn about the complaint procedure of the South Carolina Public Service Commission by going to this site: <https://psc.sc.gov/consumer-info/file-complaint#:~:text=INFORMAL%20COMPLAINT%2FINQUIRY&text=This%20division%20can%20be%20reached,00%20p.m.%2C%20Monday%20through%20Friday.&text=You%20may%20also%20visit%20their,.ors.sc.gov>.